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In the

Supreme Court of the United States

October Term, 1954

No. 680

ISTHMUS DEVELOPMENT COMPANY,
Petitioner,

v.

EDWARD R. BURT,
Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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To the Honorable Earl A. Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In reply to the Respondent's Brief Opposing Petition for Certiorari, your petitioner submits the following:

I.

ARGUMENT

1. The Texas Decisions.

The Respondent's witness, Branch testified that from 1912 until 1923 Mexico was torn with strife but that it had

had a stable government for a good many years in 1954. (R. 192, 221-222.) The cases of *Banco Minero v. Ross, 172 S. W. 711* and *Mendiola v. Gonzales, 185 S. W. 389*, were decided in 1915 and 1916, respectively. Those cases were decided during the period when the Revolution was going on in Mexico and when Northern Mexico, particularly, was in such a state of anarchy that the United States subsequently dispatched an Expeditionary Force under General Pershing into that unhappy country for the purpose of restoring order. Senor Branch's deposition discloses that such conditions terminated long ago. The Texas cases have all declined to accept jurisdition when there existed a stable government in Mexico.

The leading Texas case is *Mexican National Railway Company v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28 (1896)*. Concedely one of the reasons for declining jurisdiction in that case was the difference between the method of enforcing a judgment in Mexico and enforcing a judgment in Texas Other reasons were stated in that case. We quote the following excerpts:

> "The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the

country where he inflicted the injury, to avoid reparation for the wrong done by him."

* * * * * *

"If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this state to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originated outside the state, under the laws of a different government, a charge upon our own people. If the facts showed that this was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity." [See Johnson v. Chicago, Burlington & Quincy Railroad Company (Minn.), 66 N. W. 2d 763 (1954).]

This court held in *Woods v. Interstate Realty Company, 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)*, that when a decision rests on two or more grounds none can be relegated to the category of obiter dictum.

The Court of Appeals had the briefs of both parties before it. The Respondent there cited the same Texas cases which he cites here. The Court of Appeals concluded that the only court in the United States in which the Respondent could subject the defendant to litigation was the United States District Court for the Northern District of Texas. We must infer from this language of the opinion that the Court of Appeals was satisfied that the Texas courts would decline to take jurisdiction.

2. *The Presumption is that the law of Mexico is different from the law of Texas.*

In *Cuba Railroad Co. v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912), at page 276* the court says:

> "In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and we may presume, continuing it with such modification as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know that to be otherwise."

In that case a judgment for plaintiff was reversed because he had not pleaded the law of Cuba.

In *Ozanic v. U. S., 165 F. 2d 738, 744 (1948)*, the court held that Yugoslavia was a Civil Law Country, and that it would not be presumed that the Yugoslavic law was the same as that of the United States.

3. *The Procedure followed by the Court of Appeals for the Fifth Circuit in ascertaining Foreign Law is Contrary to the Doctrine Laid Down by this Court in Cuba Railroad v. Crosby.*

In *Cuba Railroad Company v. Crosby, 222 U. S. 473, 32 S. Ct. 132, 56 L. Ed. 274 (1912)*, a citizen of Tennessee sued a New Jersey corporation in the Circuit Court of the latter state. *(170 Fed. 369.)* The case grew out of an injury sustained by the plaintiff in Cuba. A judgment for plaintiff

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was reversed because he had not pleaded the law of Cuba. This Honorable Court said:

> "But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. * * * The only just grounds for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

Quite inconsistent with this language is that of the Court of Appeals in the case of *Daniel Lumber Company v. Empresas Hondurenas, S. A. (U. S. C. A., 5), 215 F. 2d 465 (1954)*, in which the court says:

> "Once the foreign statutes had been proved, the district court had the duty of construing them for itself with the aid of but without being bound by the opinions of the expert witnesses. Finney v. Guy, supra; Eastern Building, etc., Association v. Williamson, supra; Liechti v. Roche, supra. The court's construction of the foreign statutes might in its own good judgment be guided by the logic and reasoning underlying similar rules of the common law."

4. *Petitioner's Affirmative Invocation of the Jurisdiction of the District Court.*

Whether properly or not, Petitioner construed the complaint to be a suit for a breach of contract and so framed its answer. (R. 6.) Attached to the answer was a copy of the contract which Petitioner believed and still believes, had been entered into by the parties, such contract having been

signed by them. (R. 17-26.) Petitioner requested Respondent to admit the genuineness of the contract. (R. 8.) When Respondent denied the existence of a contract, Petitioner filed its motions to the jurisdiction and convenience of the forum. (R. 48.)

If the public policy of the State of Texas, as declared by its courts, denies jurisdiction to the Texas courts of controversies of this character, then the jurisdiction may be questioned at any time.

Because the allegations were changed from a claim for damages for breach of a written contract to those of a claim for damages for tort, the forum non conveniens plea does not come too late in this case.

The affirmative relief requested by Petitioner was on the contract, for additional rent and for expenses incurred by Petitioner in performing the contract between it and Respondent. (R. 14.)

CONCLUSION

WHEREFORE, Petitioner again prays that its petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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Attorneys for Petitioner.

BRIEF F

RESPOND

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I.

THE QUESTION PRESENTED

The sole and only question presented in this case is:

> "Can a citizen of New York be denied, under the doctrine of forum non conveniens, the right to prosecute a suit against a citizen of Texas, in the district of defendant's residence, for damages resulting from conversion of plaintiff's property by defendant in Mexico?"

II.

STATEMENT

Plaintiff is a citizen and resident of the State of New York. Defendant is a corporation organized under the laws of and domiciled in the State of Texas (R. 56, 60, 144-148); its officers and directors are residents and citizens of Texas; its principal office and place of business is in Amarillo, Texas (R. 147), within the jurisdiction of the United States District Court for the Northern District of Texas, Amarillo Division (where the suit was instituted); its president maintains his home and office in Amarillo, Texas.

The suit is one for damages resulting to plaintiff from the alleged conversion by defendant in Mexico of money and property belonging to plaintiff. There is no evidence which shows that there is any difference between the laws of Mexico and those of Texas as to liability for a conversion of the character involved. On the contrary, it was shown by the testimony of an experienced Mexican attorney that under the law of Mexico, if one party delivers personal property consisting of money or other personalty to another and the other party rightfully holds the property but thereafter the owner of the property demands its return, and the holding party refuses to return the money and other personalty, the Mexican law gives the owner of the property a right against the holder of the property; that in the case of money, the person wrongfully withholding the money is bound to return the money with 6 per cent inter-

est, and the same is true as to property other than money (R. 210, 211). This is, of course, the same as is the law of Texas and other states. The Court of Appeals reversed the holding of the District Judge that the case was proper for the application of the principles of forum non conveniens; that plaintiff's suit could be prosecuted only in Mexico.

III.

ARGUMENT

1. Texas Courts Would Not Refuse Jurisdiction

In support of its argument that the doctrine of forum non conveniens should be applied, Petitioner argues that the Texas courts would not take jurisdiction of such a case as this and therefore that the Federal courts, notwithstanding their jurisdiction based on diversity of citizenship, should relegate citizens of the United States to the courts of Mexico for prosecution of claims against other citizens based on conversion of property in Mexico. But Petitioner wholly misinterprets the basis for the holdings in the Texas cases on which it relies.

Thus, the denial of jurisdiction in *Mexican National Railway Co. v. Jackson, 33 S. W. 857*, was because of the great dissimilarity shown to exist between the laws of Texas and those of Mexico as to liability of railroads to its employees, and the methods for determining and enforcing that liability. The basis for the decision in *Banco de Mexico v. De Camara, 55 S. W. 2d 631*, was the fact that under the Mexican law liens on personal property were unlawful

and therefore a purchase in Mexico by defendant from the person who had given the mortgage in Texas could not give a cause of action against defendant in Mexico for conversion. It is also significant that in that case the evidence affirmatively showed that the laws dealing with such matters were so dissimilar in Mexico from those in Texas as to be incapable of enforcement in Texas courts. Cases similar in nature are *El Paso & Juarez Traction Co. v. Carruth, 255 S. W. 159*, and *Carter v. Tillery, 257 S. W. 2d 465.*[1] The same principle is applied even when dealing with special laws of sister states which in their mechanics are not enforceable in other states. *Johnson v. Employers Liability Assurance Corporation, 99 S. W. 2d 979 (Workmen's Compensation Laws).*

But this case does not come within the principles applied in the cases referred to. The evidence shows without dispute that there is no such dissimilarity in substance as to liability under the facts set forth in the complaint as between the laws of Mexico and the laws of Texas. Instead of being ruled by cases such as *Mexican National Railway Co. v. Jackson*, supra, *Slater v. Mexican National Railroad Co.*, supra, and other cases hereinabove referred to, this case is ruled by the opinion of the Supreme Court of Texas in *Banco Minero v. Ross, 172 S. W. 711*, a decision that has never been overruled, modified or criticized. That case, as

[1]Other cases applying the same principles are *Slater v. Mexican National Railroad Co.* (5 Cir.), 115 Fed. 593; *Slater v. Mexican National Railroad Co.*, 194 U. S. 120, and *Cuba Railroad Co. v. Crosby*, 222 U. S. 473. The holdings in all these cases are based on the dissimilarity between the foreign laws and the laws here which make it impracticable to enforce the foreign laws as to the particular type of controversy there involved.

this, was an action for conversion which took place in Mexico, the action there was by citizens of the United States against a citizen of Mexico. The court held that the Texas courts had jurisdiction. Plaintiffs in that case had deposited with a bank in Mexico a sum of money for a specific purpose. The bank failed to return the money on demand, whereupon suit based on conversion in Mexico was filed in the Texas courts, and jurisdiction was sustained.[2]

There is obviously no conflict between the rule of *Banco Minero v. Ross* and the rule of *Mexican National Railway Co. v. Jackson*. The cause of action in the *Ross* case was, as this, one purely for conversion—a transitory cause of action. There was nothing to show that the law of Mexico as to conversion was different from that of Texas and the jurisdiction of the Texas courts was sustained.

The question here discussed was presented to and determined by the Court of Appeals for the Fifth Circuit adversely to the contention of Petitioner. This court ordinarily accepts the holding of that court on questions of state law.[3]

The decision of the Court of Appeals was by "three judges who are constantly required to pass upon" Texas law questions. One of the three judges (who has been a member of the Court of Appeals for many years) was a District Judge in Texas prior to becoming a member of the court and before that was active in the practice of law in

[2] See also *Mendiola v. Gonzales*, 185 S. W. 389.

[3] *Helvering v. Stuart*, 317 U. S. 154, 163; *Spiegel's Estate v. Commissioner*, 335 U. S. 701, 708.

Houston, Texas. None of the members of the court was favorably impressed with Petitioner's theory that there was a lack of jurisdiction in the Texas courts.

2. The Doctrine of Forum Non Conveniens Has Never Been Held to Prohibit a Determination in the United States Courts of Controversies of This Character

The doctrine of forum non conveniens is applied only in rare cases. Unless the balance is strongly in favor of defendant, the plaintiff's choice of a forum should rarely be disturbed. *Gulf Oil Corporation v. Gilbert, 330 U. S. 501, 508, 509.* It has been frequently applied, primarily in admiralty cases, so as to deprive aliens of the privilege of instituting suits in our courts where the applicable laws of the alien's country as to a particular controversy are substantially different from those of this country. Ordinarily, in even admiralty cases, the doctrine has been applied only against alien plaintiffs. In *Swift & Co. v. Compania Columbiana, 339 U. S. 684, 697,* the Court stated that it had not previously had to apply the doctrine to a suit brought by a United States citizen and declined to decide that abstract question. It observed that the application of forum non conveniens principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.

The cases support the Court's analysis. *Canada Malting Co. v. Paterson Steamships, 285 U. S. 413,* was a suit instituted by citizens of Canada against a Canadian citizen

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for damages resulting from a collision between Canadian vessels in Lake Superior on the American side of the International boundary. All the officers and crew of each vessel were citizens of Canada. The Court held that principles of forum non conveniens were properly applied.

United States M. & S. Ins. Co. v. A/S Den Norske Etc. Line, 65 F. 2d 392 (C. A. 2d), was a suit filed by a United States citizen as plaintiff against a Norwegian corporation, but the Court held that plaintiff was only a subrogee and that its rights were no greater than its subrogor, a Dutch citizen, and applied the same principles as those applicable where both plaintiff and defendant are aliens. *O'Neill v. Cunard White Star, 160 F. 2d 446*, was an admiralty proceeding by a British subject against a British corporation for damages for death resulting from an occurrence on the high seas. The Court stated that although a court of admiralty has jurisdiction over a suit between aliens, it is not obliged to exercise that jurisdiction.

De Sairigne v. Gould, 83 F. Supp. 270 (D. C., S. D. N. Y.), was not an admiralty suit but was a proceeding filed by a citizen of France against a citizen of the United States, but who then resided in France. Moreover, it was affirmatively shown that the applicable French laws "are quite different from, and inconsistent with our laws."

Petitioner does not cite a case where, even in admiralty cases, it has been held that a citizen of the United States must go to a foreign country to sue another citizen of the United States in an ordinary action for conversion, merely

because the conversion occurred in a foreign country. The obligation to make restitution is the obligation of the corporation and its officers wherever they may be.[4]

3. Even Under the Rule Applicable Between Different Courts in the United States, No Sufficient Showing of Hardship Was Made to Justify Application of the Principle of Forum Non Conveniens

The primary issue in this case is whether or not there ever was a contract between plaintiff and defendant. Unquestionably, a document was signed by the parties. It is plaintiff's contention that such document was only an offer and never became effective; that plaintiff's signature thereto was rescinded by telephone prior to any purported acceptance by defendant, and that such purported acceptance by defendant was accompanied by a condition that was never agreed to by plaintiff (R. 27). The transaction was the result of negotiations between plaintiff and one R. E. O'Donnell, vice president of defendant. It is in the evidence, and not denied, that under the laws of Mexico an offeror has the right to withdraw an offer before he is notified of acceptance by the offeree (R. 204). This is, of course, also the law in this country.

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[4]The conversion involved in this case is of the type involved in *Banco Minero v. Ross*, 172 S. W. 711, namely, a refusal to return on demand property held for a special purpose. It is not the type of conversion involved in *Banco de Mexico v. De Camara*, 55 S. W. 2d 631—the purchase by defendant from a third party of a truck on which plaintiff held a mortgage that under the Mexico law was invalid but under the laws of Texas was valid.

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The motion to dismiss on the ground of forum non conveniens was based on 7 alleged grounds (Pet. 4-5). Each will now be discussed, in the light of the record:

(1) *That the transactions pleaded occurred in Mexico and the Federal District Court of Texas is not empowered to administer or enforce the laws of that country because of the difference between the civil laws and the common law.* But the evidence did not establish such dissimilarity. Nor did the evidence show that all the negotiations occurred in Mexico. Plaintiff's controverting affidavit shows that a portion thereof occurred in New York (R. 231). No testimony was offered as to any dissimilarity in the laws. On the contrary, it was affirmatively shown that the law in Mexico as to both the right to rescind an unaccepted offer and the obligation to make restitution for a conversion is the same in Mexico that it is in the states. Furthermore, depositions as to the laws of Mexico were taken by plaintiff in Mexico. Counsel for defendant was present (R. 193) but did not adduce evidence showing such dissimilarity.

(2) *That Petitioner was organized as a Western Hemisphere Trade Corporation under 28 U. S. C. A. 109; that its business, other than the purchase of equipment, was conducted in Mexico; its records were in Mexico; and the individuals involved in the negotiations with Respondent were residing and working in Mexico.* Obviously, the fact that Petitioner is a "Western Hemisphere Trade Corporation" has nothing to do with the power of the United States courts to require it to account for conversion of property of other United States citizens. *26 U. S. C. A. 109* only has

the effect to place it in a special class for tax purposes. It is still a citizen of Texas and of the United States. If it has any pertinent records in Mexico, there is no reason why copies thereof may not be made just as copies are made in the United States.

Nor is there any reason why depositions of any employees who live in Mexico and know any facts may not be obtained. There is no evidence that any witness in Mexico is unwilling to give his deposition testimony.

(3) *That Petitioner is amenable to process in Mexico.* The fact that service may be had in Mexico on a vice president obviously constitutes no reason why a corporation should not be served at its home office by service on its president.

(4) *That the operations carried on by Petitioner in Mexico required the constant presence and supervision of its Vice President, R. E. O'Donnell.* Yet he was able to be in Amarillo on April 10, 1954, to give his deposition and identify all the documents thought to be pertinent (R. 144-150) and again in Amarillo on April 30 to testify in person in support of the motion to dismiss (R. 235-248). He was a director in the corporation and attended the last director's meeting which was held in May of the preceding year (R. 146).

The Court of Appeals considered it significant that Mr. O'Donnell was able to get away from his duties in Mexico to come to Amarillo to testify on the motion to dismiss. It also considered that there was an obvious inconvenience to plaintiff in having to come from his other work in New

York to Texas to prosecute his claim far removed from his residence and pointed out that to force him to litigate his claim in Mexico would only compound that inconvenience. (Pet. App. xi.)

(5) *That Respondent was simply seeking to vex and harass Petitioner by filing the suit in Texas.* This charge was categorically denied by Respondent under oath (R. 233). The Court of Appeals properly rejected that contention. A suit to recover what plaintiff firmly believes he is entitled to recover cannot be classified as one that is vexatious and harassing in the legal sense.

(6) *That most of Petitioner's assets are in Mexico and any judgment obtained by plaintiff could not be enforced by the United States District Court for the Northern District of Texas.* This should not be a matter of concern to Petitioner. Respondent is willing to run the risk of being able to collect the judgment and has no fears as to the powers of the United States District Court to enforce its decrees against a corporation domiciled in its jurisdiction.

(7) *That it would be an imposition upon the citizens of the Northern District of Texas who might be called as jurors to spend their time in attempting to solve a controversy "which was of entirely foreign interest."* But *no* foreign interest is here involved. The only interests involved are local to this country. If plaintiff succeeds, a citizen of Texas loses and a citizen of New York gains; if plaintiff does not succeed, the gain will be to a citizen of Texas and the loss will be that of a citizen of New York. This is not a case where aliens of the United States seek to use our courts

to settle their differences. The jurors in this country daily pass on the merits of disputes between citizens of different states.

4. Petitioner Affirmatively Invoked the Jurisdiction of the District Court

The complaint was filed in the District Court on January 13, 1954 (R. 1). Thereafter, on March 2, 1954 (R. 6), Petitioner filed its answer. That answer included a cross-complaint against Respondent for $17,500. Thereafter, on March 17, 1954, Respondent filed its response to the cross-complaint (R. 27). The motion to dismiss based on forum non conveniens was not filed until March 29, 1954 (R. 48). The matters set forth in the cross-complaint grow out of the same transactions as those set forth in the complaint. Having affirmatively invoked the jurisdiction of the District Court by filing the cross-complaint Petitioner can hardly say with good grace that those transactions should be inquired into only in Mexico.

CONCLUSION

Respondent respectfully says that the application for certiorari should be denied.

Respectfully submitted,

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